HONG LEONG BANK BHD

v.

BENNES MACHINERY SDN BHD & ORS

HIGH COURT MALAYA, KUALA LUMPUR
MARY LIM JC
[SUIT NO: D6-22-515-2005]
24 NOVEMBER 2009

CONTRACT: *Hire purchase - Guarantee - Liability of guarantor - Whether statement of indebtedness is conclusive evidence of debt due - Whether conclusiveness displaced by proof of manifest error or fraud - Definition of manifest error*

CONTRACT: *Hire purchase - Guarantee - Whether guarantee properly executed - Absence of guarantor's initials on every page of guarantee - Guarantor signed blank standard form guarantee - Whether validity of guarantee affected - Guarantor well aware of type and nature of document - Guarantee valid*

EVIDENCE: *Admissions - Letters written without prejudice - Whether privileged and inadmissible - Without prejudice letter culminating in successful settlement between parties - Privilege spent and no longer existing*

EVIDENCE: *Privilege - Privileged communications - 'Without prejudice' letters - Without prejudice letter culminating in successful settlement between parties - Privilege spent and no longer existing*

HIRE PURCHASE: *Hire purchase agreement - Breach - Statement of indebtedness - Whether statement conclusive evidence of debt due - Whether conclusiveness displaced by proof of manifest error or fraud - Definition of manifest error*

HIRE PURCHASE: *Hire purchase agreement - Guarantee - Limitation - Whether suit against guarantors time barred - When does time start to run against guarantors*

Pursuant to 5 industrial hire-purchase agreements, the 1st defendant agreed to take on hire from the plaintiff 5 used units of Favco Tower Cranes of various models. The 1st defendant failed to make the repayments for all 5 industrial hire-purchase agreements. On 17 June 2003, the parties agreed to restructure the repayment terms of the outstanding sums. Five payments were made under these terms before the repayments stopped altogether. A letter of termination and demand was then issued by the plaintiff. The

plaintiff then filed this claim for the total outstanding sum of RM386,343.57 due for all 5 industrial hire-purchase agreements. The 2nd to the 5th defendants were sued jointly and severally as guarantors of the 5 industrial hire-purchase agreements. The 2nd defendant denied standing as guarantors. The 2nd defendant admitted that the signatures appearing in all 5 letters of guarantee and indemnity were his but maintained that he had pre-signed only blank forms and had no intention of standing as guarantor for these 5 industrial hire-purchase agreements. The 1st defendant pleaded the defence of limitation. It was argued that a claim founded upon the 5 industrial hire-purchase agreements must be made before 29 March 2005 in respect of the first hire-purchase agreement and before 23 December 2004 in respect of the balance four agreements. Since the claim was only filed on 8 April 2005, the whole claim was barred by virtue of s. 6(1) of the Limitation Act 1953. It was also pleaded that the claim was unsustainable as the 5 tower cranes had been sold to Westform Far East Sdn Bhd (Westform) with the plaintiff's consent and that the right to receive monies due from such sales had been assigned to the plaintiff. It was also claimed that the letter dated 17 June 2003 was a without prejudice communication and therefore cannot be referred to. The issues to be decided were: (i) whether the 2nd defendant was guarantor to the 5 industrial hire-purchase agreements; (ii) whether the plaintiff's claim was time barred; and (iii) whether the plaintiff's claim was proved.

Held (allowing the plaintiff's claim with cost):

(1) The lack of the 2nd defendant's initials on every page of the guarantee made no iota of difference because it was the 2nd defendant's signature which was important. It was clear that the 2nd defendant was agreeable to being a guarantor. Although the 2nd defendant had signed a blank form, it was not a blank page. It was a standard form guarantee. The 2nd defendant was well aware of the type and nature of the document that he was giving his consent to. (para 9)

(2) The failure of the 1st defendant to pay was a breach of the terms of the primary hire-purchase agreements. The guarantors' failure to pay upon the demand made to them was a breach of the terms of the guarantee and indemnity upon which the cause of action arose. Time started to run from this breach. Thus, the suit against the guarantors was filed within the prescribed period as provided under s. 6(1) of the Limitation Act. (para 16)

(3) The letter of 17 June 2003 culminated in a successful settlement between the parties. The 1st defendant proceeded to make 5 payments pursuant to the restructuring but later defaulted on these new restructured terms. As such, the settlement had been relied upon on and executed. Thus, the protection was spent. The parties had moved on from the cover of protection necessary to encourage negotiation and settlement. (paras 20 & 21)

(4) Where a statement is prepared as evidence of indebtedness, the decisions in *Citibank NA v. Ooi Boon Leong & Ors* and *Cempaka Finance Bhd v. Ho Lai Ying & Anor* settled the law as to its conclusiveness. Such statements not unlike certificates of indebtedness have been found to bear the quality of being conclusive evidence of the debt due to the plaintiff. But such conclusiveness of the amount or debt due can be displaced where the defendants can show manifest errors on the face of the certificates or statements, or where there is fraud. Manifest error does not mean mere or just any error but that which is obviously irreconcilable. There were none here. (paras 24 & 25)

(5) The 1st defendant had sold the tower cranes without the prior consent of the plaintiff. When the plaintiff learnt about the sale, it disagreed. Since the sale was objected to, the issue of assignment of the proceeds of sale did not arise. (para 34)

Case(s) referred to:
Cempaka Finance Bhd v. Ho Lai Ying & Anor [2006] 3 CLJ 544 FC ***(refd)***
Chen Heng Ping @ Tian Seow Hock & Ors v. Intradagang Merchant Bankers (M) Berhad [1995] 3 CLJ 690 CA ***(refd)***
Citibank NA v. Ooi Boon Leong & Ors [1980] 1 LNS 168 FC ***(refd)***
Curtis v. Chemical Cleaning & Dyeing Co Ltd [1951] 1 All ER 631 ***(refd)***
Dusun Desaru Sdn Bhd & Anor v. Wang Ah Yu & Ors [1999] 2 CLJ 749 HC ***(refd)***
Malayan Banking Bhd v. Foo See Moi [1981] 1 LNS 95 FC ***(refd)***
Ooi Yoke In & Anor v. Public Finance Berhad [1993] 2 CLJ 464 HC ***(refd)***
Tomlin v. Standard Telephones and Cables Ltd [1969] 3 All ER 201 ***(refd)***

Legislation referred to:
Limitation Act 1953, ss. 6(1), 26(2)

For the plaintiff - Ling Chee Wei; M/s Ho, Loke & Koh
For the 2nd, 3rd & 4th defendants - Joanne Lazaroo; M/s Amin, Yap & Co

Reported by Amutha Suppayah

JUDGMENT

Mary Lim JC:

[1] Pursuant to a hire-purchase agreement dated 29 March 1996, and four separate hire-purchase agreements all dated 23 December 1995 (collectively known as 'the five industrial hire-purchase agreements'), the 1st defendant agreed to take on hire from the plaintiff five units of used units Favco Tower Cranes of various models. Under each of these hire-purchase agreements, the 1st defendant agreed to make monthly instalments together with interest at the rate of 12.09% per annum calculated on a daily basis until full settlement. The monthly repayments were different for each hire-purchase agreement.

[2] The 1st defendant failed to make the repayments for all five industrial hire-purchase agreements. On 17 June 2003, the parties agreed to a restructure the repayment terms of the outstanding sums. Five payments were made under these terms between 8 July 2003 to 21 January 2004 before the repayments stopped altogether. A letter of termination and demand was then issued by the solicitors of the plaintiff on 9 March 2005. Despite such demand, there was no settlement. The plaintiff then filed this claim for the total outstanding sum of RM386,343.57 as at 4 March 2005 due for all five industrial hire-purchase agreements together with interest and solicitor-client costs. The 2nd to the 5th defendants are sued jointly and severally as guarantors of the five industrial hire-purchase agreements.

[3] In defence, the guarantors denied standing as guarantors. Specifically, the 1st defendant pleaded the defence of limitation, that all sums due under the five industrial hire-purchase agreements were time-barred. It was also pleaded that the claim was unsustainable as the five tower cranes had been sold to Westform Far East Sdn Bhd (Westform) with the consent of the plaintiff. The right to receive monies due from such sales had further been assigned to the plaintiff. By virtue of such assignment the plaintiff ought to sue Westform and not the defendants.

[4] Third-party proceedings were initiated against Westform but this was withdrawn on the first day of trial. Learned counsel for the defendants informed the court that Westform had been wound-up some time April of this year. For similar reasons, the plaintiff withdrew the action against the 1st and 5th defendants.

[5] Three broad issues were identified for trial, namely:

a. whether the 2nd, 3rd and 4th defendants are guarantors to the five industrial hire-purchase agreements;

b. whether the plaintiff's claim is barred by virtue of s. 6 of the Limitation Act 1953; and

c. whether the plaintiff's claim is proved.

Whether The 2nd, 3rd And 4th Defendants Are Guarantors To The Five Industrial Hire-purchase Facilities Agreements

[6] This issue was initially canvassed by the 2nd, 3rd and 4th defendants. However, learned counsel for these defendants informed the court that the 3rd and 4th defendants could not in good faith submit to the contrary. These two defendants accept that they are guarantors to the five industrial hire-purchase agreements. This issue is now relevant only in relation to the 2nd defendant.

[7] In testimony, 2nd defendant admitted that the signatures appearing in all five letters of guarantee and indemnity are his. Be that as it may, he maintains that he had pre-signed only blank forms and had no intention of standing as guarantor for these five industrial hire-purchase agreements. These blank forms must have been used out of mistake and without his knowledge. In support of his contention, he offered the following evidence:

a. all pages of the five industrial hire-purchase agreements were not initialled by him;

b. he did not sign any letter of offer from the plaintiff to signify acceptance which is a pre-requisite for any facility given out by a financial institution, including the plaintiff especially where the sums involved are large as is the case here;

c. the five industrial hire-purchase agreements used the 2nd defendant's old identification card number when new identification cards had already been issued to the 2nd defendant since 29 July 1993; and

d. no one saw the 2nd defendant sign all five industrial hire-purchase agreements.

[8] In essence, the 2nd defendant's defence is that there is no binding guarantee since he had no intention of being a guarantor to these five industrial hire-purchase agreements.

[9] I have carefully scrutinized the evidence adduced and I find myself unable to accept this line of defence. The lack of the 2nd defendant's initials on every page of the guarantee makes *no iota* of difference because it is the 2nd defendant's signature which is important. And that signature must be affixed at where it is most required - at the end of the document. This is the critical spot as it can then be construed as encapsulating the whole document. A signature signifies an affirmation and acceptance of the terms of the guarantee which regulates the relationship of the parties or signatories to the guarantee. It is also an acknowledgment on the part of the guarantors of having read the hire purchase agreement to which the guarantee is given. The significance of signature is no different in this case. The fact that none of the witnesses called by the plaintiff saw the 2nd defendant signing the guarantee is immaterial and unnecessary since the 2nd defendant is not denying that the signature is his. If that had been the case, then the person who witnessed the signing, Kua Lee Nah ought to have been called.

[10] From the 2nd defendant's own testimony, it is clear that the 2nd defendant was agreeable to being a guarantor. Although the 2nd defendant had signed a blank form, it was not a blank page. The guarantees in this case appear to be standard form guarantees and that is expressly made clear in the assignation given to the document on its very first page which reads in bold upper case letters - "Letter Of Guarantee & Indemnity". What had been left blank are the spaces for filling in the details of the relevant hire-purchase agreements, for example the reference numbers of the hire-purchase agreements and the dates.

[11] From this, it can be inferred that the 2nd defendant was well aware of the type and nature of the document that he was giving his consent to. The document in question is beyond dispute, a guarantee. Contrary to the 2nd defendant's contention, I find that the fact that the 2nd defendant was prepared to sign in blank signifies the 2nd defendant's willingness to be a guarantor regardless of which hire purchase agreement is under consideration and when that agreement is under consideration. The 2nd defendant was aware and knew that he would be bound by the terms of the agreements that he was affixing his signature to. To borrow the words of Denning J in *Curtis v. Chemical Cleaning & Dyeing Co Ltd* [1951] 1 All ER 631 and quoted in *Ooi Yoke In & Anor v. Public Finance Berhad* [1993] 2 CLJ 464 @ 469:

> ... his signature is irrefragable evidence of his assent to the whole contract, including the exempting clauses, unless the signature is shown to be obtained by fraud or misrepresentation.

[12] It does not make any difference whether an old or a new identification card is used. Identification cards are supportive as to the genuineness of the identity of the guarantors. The continued use of an old identification card when a new one has been issued in its stead has no bearing on the issue at hand. The contents in the old card are not nullified by the change from an old to a new identification card. I would not attempt to speculate as to the reasons why an old identification card continues to be in use when a new card has been issued. Save to say that the 2nd defendant's old identification card was used and the plaintiff was ready and willing to accept the old identification card.

[13] The 2nd defendant also contended that he was not a director of the 1st defendant at the material time. According to him, it "did not make good business sense" nor is it "good business acumen that he would willingly execute a guarantee and stand as guarantor of the 1st defendant company when he was not its director at the material time". In this respect, unless this was a specific requirement that only directors of a borrowing institution can be guarantors, I find the suggestion that the 2nd defendant ought not to be liable by reason of him not being a director in the 1st defendant company at the material time, irrelevant.

[14] From the evidence adduced, I find the 2nd defendant a much involved person in the affairs of the 1st defendant company. While he may have denied his readiness to be a guarantor to these five industrial hire-purchase agreements, he was obviously involved in the restructuring of the repayments. Although the letter was written on a without prejudice basis, an issue which I shall deal with in greater detail later, that letter nevertheless is evidence of the 2nd defendant's knowledge, capacity and extent of his involvement in relation to the five industrial hire-purchase agreements. If the 2nd defendant was not a guarantor as contended today, I would have expected him to raise it at the earliest opportunity. He did not. Instead, he participated in the restructuring arrangements. Why would he do so if he was not a party to the agreements? The arguments put forth by the 2nd defendant in this regard are not supported by the evidence and are therefore rejected. I find that the 2nd defendant is indeed a guarantor to the five industrial hire-purchase agreements.

A **Whether The Plaintiff's Claim Is Barred By Virtue Of Section 6 Of The Limitation Act 1953**

[15] It is the submission Miss Joanne Lazaroo, counsel for these defendants that the plaintiff's claim ought to be dismissed because it was time-barred. Her argument is rather simple. According to Miss Lazaroo, of the five industrial hire-purchase agreements, one was dated 29 March 1999 whereas the other four were dated 23 December 1998. A claim founded on these agreements must therefore be made before 29 March 2005 in respect of the first hire-purchase agreement and before 23 December 2004 in respect of the balance four agreements. Since the claim was only filed on 8 April 2005, the whole claim was barred by virtue of s. 6(1) of the Limitation Act 1953.

[16] While the argument is simple, it is with respect rather simplistic. The claim against the individual guarantors is by reason of their failure to pay upon the demand made *vide* letter dated 8 March 2005. The demand arises because of the breach of the 1st defendant to make the repayments as agreed. Under the terms of the guarantee, the guarantors agreed to "jointly and severally guarantee upon written demand being made by you to the guarantors the due and punctual payment of all sums which are due or may become due to you under or arising out of the hire purchase agreement or of any variation or extension thereof and the due performance and observation by the Hirer of each and every term and condition in the hire purchase agreement or variation or extension thereof to be performed and observed by the Hirer." The failure of the 1st defendant (hirer) to pay is obviously a breach of the terms of the primary hire-purchase agreements. The guarantors' failure to pay upon the demand now made to them is an alleged breach of the terms of the guarantee and indemnity upon which this present cause of action arises. This can be seen from para. 21 of the statement of claim. Time only starts to run from this breach. In the circumstances, the suit against the guarantors is filed within the prescribed period as provided under s. 6(1) of the Limitation Act.

[17] At this point, I would like to address the matter of the letter dated 17 June 2003, a without prejudice communication. The defendants submit that this letter cannot be referred to at all since the communications did not elicit a settlement between the parties.

[18] The rationale for disallowing reliance on without prejudice communications can be found in *Malayan Banking Bhd v. Foo See* Moi [1981] 1 LNS 95 where Chang Min Tat FJ said:

> It is settled law that letters written without prejudice are inadmissible in evidence of the negotiations attempted. This is in order not to fetter but to enlarge the scope of the negotiations, so that a solution acceptable to both sides can be more easily reached. But it is also settled law that where the negotiations conducted without prejudice lead to a settlement, then the letters become admissible in evidence of the terms of the settlement, unless of course the agreement has become incorporated in another document which would then be the evidence of the agreement.

[19] Though there is a fair amount of case law on this, I need not set it all out save for the above. What is more pertinent to address is whether once the document is said to be inadmissible in evidence of the settlement, is such inadmissibility cast in stone or can that privilege be lost. In this regard, I agree with the approach adopted by Abdul Malik Ishak J (as he then was) in *Dusun Desaru Sdn Bhd & Anor v. Wang Ah Yu & Ors* [1999] 2 CLJ 749, 757 where in addressing the same issue, his lordship took the view that a document may lose its privilege "... once the settlement is negotiated successfully and the matters finalized completely ... because its purpose is now complete and at an end ..."

[20] Here, there is no doubt that the letter of 17 June 2003 culminated in a successful settlement between the parties. In fact, the 1st defendant proceeded to make five payments pursuant to the restructuring as agreed and as testified by Lee Wee Seng, the plaintiff's manager in the Remedial Management Department (PW1). The 1st defendant then defaulted on these new restructured terms and the suit against all the defendants is premised on the subsequent breach as seen at paras. 3, 4, 5, 6 and 7 of the reply to the defence filed by the plaintiff. It is only upon default of the repayment terms as set out in the letter of 17 June 2003 that the letter of termination and demand was issued by the plaintiff on 9 March 2005. In fact, the 1st defendant made two more payments after this letter was issued and that was for sums of RM6,000 each on 18 May 2005 and 6 July 2005 respectively.

[21] As far as I can see, the mere fact that there were payments made pursuant to the without prejudice settlement reached on 17 June 2003 shows that the negotiations to resolve the matter between the parties was successful and completed. Even more, the settlement was relied on and executed. Once this happens, the protection necessary in the first place is spent. If there is a

subsequent default, I do not see how and certainly the need for that protection to be reinstated. With respect, I disagree with Miss Lazaroo's contention that "Rain or shine, that umbrella should remain", to quote the words of Ormrod J in *Tomlin v. Standard Telephones and Cables Ltd* [1969] 3 All ER 201 who ascribed the 'without prejudice' protection as akin to lifting "the umbrella of 'without prejudice'". The rain has stopped. It is now a separate rainfall. The parties have long moved on from the cover of protection necessary to encourage and stimulate negotiation and settlement. Once resolved, the terms of the settlement bind and may be relied on to compel performance or be a basis of action, as is the case here.

[22] With this determination, I am of the added view that the claim is not time-barred by virtue of the repayments made between 2003 and 2004 and, as late as 2005. Section 26(2) of the Limitation Act 1953 provides that the plaintiff's right to claim "shall be deemed to have accrued on and not before the last of the acknowledgment or the last payment." For these further reasons, the claim of the plaintiff is not time-barred.

Whether The Plaintiff's Claim Is Proved

[23] It is important to keep this issue in its proper perspective. This claim is now at trial in respect of the claim only against the guarantors. Under cl. 7 of the letter of guarantee and indemnity it is provided that: "Notwithstanding the provisions of cl. 5 hereinabove a statement signed by the manager, assistant manager or any one of your authorized personnel as to the money and liabilities for the time being due or incurred to you from or by the Hirer shall be conclusive evidence in any legal proceedings against the guarantor(s) or his/their successors in title for all purposes." A statement of account as at 4 March 2005 has indeed been prepared pursuant to this as evidenced at p. 165 of Bundle A which contains the documents agreed to its authenticity but not to their contents.

[24] Where a statement is prepared as evidence of indebtedness, the decisions in *Citibank NA v. Ooi Boon Leong & Ors* [1980] 1 LNS 168 and *Cempaka Finance Bhd v. Ho Lai Ying & Anor* [2006] 3 CLJ 544 have settled the law as to its conclusiveness. Such statements not unlike certificates of indebtedness have been found to bear the quality of being conclusive evidence of the debt due to the plaintiff. But such conclusiveness of the amount or debt due can be displaced where the defendants can show manifest errors on the face of the certificates or statements, or where there is fraud. That same principle applies whether in relation to the principal

debtor or to the guarantors - see *Chen Heng Ping @ Tian Seow Hock & Ors v. Intradagang Merchant Bankers (M) Berhad* [1995] 3 CLJ 690. At p. 695, Mahadev Shanker JCA was of the view that guarantors are not precluded " ... from adducing evidence to show that there is manifest error on the face of the certificate or fraud". But "the initial onus is on the guarantors. The court is not bound by the contractual provision in the guarantee. When evidence is produced which casts doubts on the accuracy of the certificate, it should not accept the certificate as conclusive. It is then for the plaintiff to prove the quantum of the debt claimed in accordance with the requirements of the Evidence Act 1950".

[25] Here, the defendants attempted to show manifest error on the face of the statement by cross-referring the details in the statement with the details appearing at the first schedule of the respective hire-purchase agreements. Although the focus was on p. 125 of bundle A, the effect is the same as that document is similar to the statement found at p. 165 of bundle A. This argument is only applicable in respect of four of five agreements and this is how the error purportedly occurs.

[26] In the 2nd to the 5th industrial hire-purchase agreements, the 1st defendant had made some initial (cash) payments to the plaintiff. However, such payments were not reflected in the statement relied on by the plaintiff. Instead, under the item bearing the description "Instalment payable under agreement" the sums stated was the total cost of the goods together with the costs of hire or hire charges. According to Tan Hai Yeen, the 2nd defendant (DW2), the sum inserted here ought to be a lesser sum as there must be a discount for the initial payments made. These sums therefore did not tally with the figures appearing in the first schedule. The contention of the defendants then is the presence of manifest error in the statement. With such error, the plaintiff is no longer entitled to rely on the statement prepared in which case the plaintiff must prove its claim by adducing some other evidence. Since it has failed to do so, the claim must be dismissed.

[27] PW1 testified on this statement. Having heard his evidence, and having examined the documentary evidence, I am satisfied with the explanation given. The statement must be read and understood in its entirety. This is how the statement is prepared. It sets out the agreement details, instalments payable, instalments paid, outstanding sums, late payment interest and other charges, and the grand total due for each of the five industrial hire-purchase agreements. While the sum stated under "instalments payable under agreement" is a sum comprising the costs of the goods and the

hiring charges, what is important is whether the amount claimed as due is wrong. Has the statement failed to take into account the sums already paid, whether by instalments or as the initial payment? If it has, then the statement is incorrect. But if it has, then it does not matter if the description given to the various entries in the statement is inaccurate so long as it is right where it matters. And that is in the amount of instalments paid to the date of the statement and the amounts due. I do not see such allegation. If the statement had failed to take into account the initial payments made, I would have expected the defendants to say that the respective total amounts due are wrong. If those payments had been included, either there would be no outstanding debts due or even a claim for over-payments. Manifest error does not mean mere or just any error but that which is obviously irreconcilable. I do not see any here. Deductions have been made in accordance with cl. 3(I) of the respective hire-purchase agreements "in consideration of the option to purchase" granted by the plaintiff and I am satisfied that the claims have been correctly calculated. The statement is conclusive evidence of the indebtedness of the defendants. But that is only as of 4 March 2005. In the light of the evidence tendered, that level of indebtedness has to be revisited. Insofar as the 1st hire-purchase agreement is concerned, only the sum of RM76,856.94 is allowed. This is to take into account the subsequent payments made after the claim had been filed. A further sum of RM12,000 is to be deducted from the total sum due as according to Ho Teck Guan the Assistant Manager for Credit Management, Business Banking Division of the plaintiff (PW3), two separate sums of RM6,000 each was made on 18 May 2005 and 6 July 2005.

[28] In the submissions of learned counsel for the defendants, some issue was made over the non-receipt of the notices of demand from the plaintiff's demand. I am unable to accept this argument. From para. 7 of the defence filed, it would appear that the defendants have in fact admitted to the receipt of the demand. This was also one of the facts agreed between the parties prior to trial. It would be highly improper, if not wrong to allow the defendants to renege on their agreement and to depart from their pleaded case.

[29] Another issue that was taken up concerns the plaintiff's failure to furnish the guarantors with monthly or periodic statements. Once again, this was not part of the pleaded case. Even if it was, it is irrelevant to the consideration of liability in this case since the letters of guarantees do not oblige the plaintiff to do so.

[30] The final issue concerns the assignment of the debt to Westform. This is as pleaded at paras. 9, 10, 11 and 12 of the defence. It is the defendants' contention that the claim must be made to Westform since three cranes were sold with the plaintiff's consent as evidenced by letter dated 26 May 2005. That letter can be found at p. 128 of bundle A. This is of course refuted by the plaintiff who maintained that the fact of sale to this third party was only made known to the plaintiff after the sale. The contents of the plaintiff's letter dated 26 May 2005 is critical and I shall set it out:

> We refer to your letter dated 17th May 2005.
>
> Please be informed that our management is agreeable to withhold our legal action for three (3) months in order for you to pursue payment from the purchaser and thereafter remit the whole sale proceeds to us failing which we shall continue with our action without further reference to you.
>
> Meanwhile, you are to continue with monthly payment of RM3000.00 for the next three months effectively on June till August 05.

[31] In this regard, two aspects need consideration. First, whether there was consent to sell and second, whether there is a valid assignment of the proceeds of sale.

[32] With regard the first aspect, it is evident from letter dated 5 January 2004 from Westform (p. 121 bundle A) that the sale of the three cranes to Westform took place around this time. By 28 December 2004, Westform had already taken delivery of the three cranes and was being reminded to settle outstanding balances (p. 122 Bundle A). Other than the fact that the letter of 26 May 2005 does not contain the requisite consent that was relied on by the defendants, this letter was written long after the sale of 5 January 2004 had been completed. In fact, from the plaintiff's letter dated 3 May 2005, it can be seen that the plaintiff was displeased with the sale that was made without its "prior written approval" and though oddly worded can be readily inferred as disagreement to the sale. The sale or the disposal of the three cranes was therefore without the consent or even knowledge of the plaintiff.

[33] On the second aspect of the issue of assignment, Miss Lazaroo submitted that there was implied assignment looking at the circumstances of the case. The defendants sought to rely on a letter dated 16 May 2005 written by the 1st defendant reminding Westform to settle the outstanding sum and informing of an assignment of the outstanding payments to the plaintiff. The lack

of protest to this letter which had been copied to the plaintiff was construed as acquiescence to the sale. It was also submitted that the plaintiff had a duty to mitigate by reclaiming the three cranes from Westform.

[34] I disagree. There is clear evidence that the 1st defendant sold without the prior consent of the plaintiff. When the plaintiff learnt about the sale, it disagreed. Since the sale was objected to, the issue of assignment of the proceeds of sale does not arise. To allow such an argument to take root would be to create an untenable situation where owners of goods being unaware and not having consented to the sale to a third party, would not be able to rely and enforce the terms in the fundamental agreement between themselves and hirers of goods in the event of a breach. Instead, owners such as the plaintiff would be obliged to trace the buyers of their goods sold without their consent. In any event, it is clearly provided under cl. 9 (II) of the hire-purchase agreement that "... Owners shall be entitled without notice to the Hirer forthwith to commence legal proceedings against the Hirer for the recovery of the whole outstanding balance together with interest thereto accrued and or payable by the Hirer to the Owners hereunder without first having recourse to take possession of the Goods or for the realization thereof or exercise of any other rights or remedies whatsoever."

[35] From the consideration above, I find the plaintiff's claim proved on a balance of probabilities. Accordingly, I order the defendants to pay the plaintiff:

a. the sum of RM367,184.45 (after taking into account the payments subsequent to filing of claim);

b. simple interest at 12.09% per annum calculated on a daily basis with effect from 4 March 2005 till date of judgment on the sum of RM207,483.25 and thereafter at 8% per annum till full and final settlement; and

c. costs of RM30,000.